Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

HOWARD L. KERFOOT, as Administrator of the Goods Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

Petitioner,

AGAINST

ROBERT H. KELLEY,

Defendant,

AND

RUTH KELLEY,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinion of the Court Below.

The opinion of the Court of Appeals of the State of New York is to be found reported in 294 N. Y. 288.

II.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

Congress of February 13, 1925 (U. S. C., Title 28, Section 347). The judgment to be reviewed was filed on May 25, 1945.

III.

Statement of the Case.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1-3 thereof.

IV.

Assignment of Errors.

The Court of Appeals violated the provisions of the seventh amendment to the Constitution of the United States of America.

The Court of Appeals of the State of New York erred in reversing the judgment of the Appellate Division of the Supreme Court in the First Juudicial Department, which affirmed by a four to one decision a judgment of the Supreme Court in favor of the petitioner entered in Bronx County upon a verdict rendered by a jury in Trial Term (Hammer, *J.*), which verdict was predicated upon a factual issue in a negligence action.

The error of the Court of Appeals of the State of New York was that it took to itself, and took from the jury, the prerogative of deciding a question of fact on conflicting testimony.

The Court of Appeals of the State of New York committed further error in taking from the jury and taking on to itself the right of passing upon the probative value, credibility and sufficiency of the evidence.

Summary of Argument.

This Court has never permitted an encroachment upon the rights of a litigant to a trial by jury. The preroga-

tive of passing upon an issue of fact has been summarily and unjustly taken away from the jury and assumed by the Court of Appeals of the State of New York contrary to all law and in violation and direct contradiction of the law as laid down by this Court in the case of *Slocum* v. *N. Y. Life Insurance Co.*, 228 U. S. 364 and in violation of the seventh amendment to the Constitution of the United States of America.

POINT I.

The Court erred in substituting its judgment on the facts for that of the jury.

As early as 1830, in the case of:

Parsons v. *Bedford*, 3 Pet. 433, 1830, 28 U. S. 433,

the Court laid down a principle of law which has consistently been followed by all the Courts of this country ever since, and which principle was reiterated in the case of:

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364,

wherein the court stated on page 378 as follows:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of:

> *Walker* v. *New Mexico &c. Railroad Co.*, 165 U. S. 593:

"This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In the case of:

Johnson v. *Dierks Lumber & Coal Co.*, 130 Fed. (2d) 115,

the court stated on page 119:

"Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

See also:

Goldstein v. *Pullman*, 220 N. Y. 549;
Tantillo v. *Goldstein Bros. Amusement Co.*, 248 N. Y. 286;
McNally v. *Oakwood*, 210 App. Div. 612, aff'd 240 N. Y. 600.

In the case of *Howard* v. *Louisiana & A. Ry. Co.*, 49 Fed. (2d) 571, the court stated on page 574:

"This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R.R. Co.* v. *Groeger*, 266 U. S. 521, the court stated on page 524:

"The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

In the case at bar the trial court as well as four judges of the Appellate Division of the Supreme Court of the State of New York agreed with the jury that the evidence showed gross negligence.

POINT II.

There was ample evidence to sustain the jury's findings.

The action was tried under the well settled laws of the State of Virginia, that where a vehicle is driven in such a manner as to knowingly or wantonly increase the ordinary risks of driving resulting in injury to a guest, it constitutes gross negligence and imposes liability on the driver for the injuries or death suffered by the guest. See:

Poole v. *Kelley*, 162 Va. 279,

where on pages 289 and 290 the court stated:

> "We do not undertake to say that any certain speed is gross negligence where the road is wide and straight. What may be deemed ordinary care in one case may under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reason-

able men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

Under the Virginia law, approval of a verdict by the trial judge adds weight to the verdict. See:

Margiotta v. *Aycock*, 162 Va. 557.

In the case at bar the trial judge approved the jury verdict.

Mrs. Kelley drove her car around a sharp bend (R., p. 12) on a narrow road (R., p. 11) at an excessive rate of speed (R., p. 13), then drove her car along the wrong side of the roadway (R., p. 13) at the rate of 50 miles an hour (R., p. 13); she rode with her two left wheels in a ditch 18" deep (R., p. 11) for a distance of 30 feet (R., p. 13) at the same rate of speed; she then turned her car sharply to the right out of the ditch without slackening speed; then drove diagonally across the road still going at 50 miles an hour (R., p. 13) at which place the car overturned and went down an embankment on the right side of the road, turning over about three times and landing 15 feet away from the road (R., p. 14). The car was seen by the eye witness from the time it started to make the curve 200 feet away (R., p. 12) until it was 75 feet past the witness (R., p. 16).

The defendant did not take the witness stand nor was any explanation offered for her not being present at the trial, hence the jury was justified in accepting as true all the inferences which could be reasonably drawn from the plaintiff's testimony.

No reasonable person can honestly state that driving a car at the rate of 50 miles an hour along the wrong side of the roadway will not add to the ordinary risks of driving. That in itself is sufficient to sustain the jury's findings of gross negligence.

Driving with two wheels in a ditch 18" deep at the rate of 50 miles an hour is hardly the type of driving that a guest can be expected to anticipate or constitutes such risk as she can reasonably be expected to foresee or assume.

Driving from the right side of the road clear across to the left and back again to the right, is likewise not a reasonable risk that a guest should be expected to assume.

Coupled with the foregoing, there was the deliberate disregard and wanton carelessness of driving around a sharp curve on a narrow road at the rate of 50 miles an hour.

All of the foregoing facts were testified to by an eye witness, a reputable person, formerly a surveyor for the Norfolk and Western Railroad (127) and a member of the United States Armed Forces at the time of the deposition (126).

All reasonable inferences could be drawn therefrom, particularly where there was no contradiction by any witness nor by the defendant herself.

In the *Poole* case, *supra*, on page 289, the court stated:

> "He then lost control and it is reasonable to assume that he lost control because he attempted to turn too sharply traveling at excessive speed." * * *

In the case at bar there was more evidence of fault, as well as evidence of fault of a greater degree, than in the *Poole* case, *supra*, in which the court stated on page 284:

> "We have a verdict, confirmed by the judge who saw the witnesses and heard the evidence. It must be sustained if there is substantial evidence to support it. All presumptions are in its favor."

In the case at bar the trial judge and four appellate court judges confirmed the jury's verdict.

In the case of *Judy* v. *Doyle*, 130 Va. 392, the court stated on pages 405 and 406:

> "It is the province of the court to determine in the first instance whether or not the facts offered in evidence, tending to prove an injury to a plaintiff, are too remote from the defendant's act of negligence, to constitute an element of the plaintiff's recovery."

The Trial Court did so in the case at bar in favor of the petitioner.

The evidence was amply sufficient to sustain the verdict and the Trial Court so found.

The Trial Court found that there was sufficient facts offered in evidence tending to prove that the respondent was guilty of gross negligence and in which finding said Trial Court was sustained by the Appellate Division of the Supreme Court of the State of New York.

It seems that the uniform view of the highest courts of the State of Virginia is to impose liability on a driver who meets with an accident on crossing to the wrong side of the road or who attempts to negotiate a sharp turn at a fast rate of speed.

The decisions relied on by the lower Court state nothing to the contrary but actually sustain this view.

The uncontradicted evidence in the case at bar shows:

a. Respondent drove on the wrong side of the road.

b. Respondent drove with her two left wheels in a ditch 18" deep and on the wrong side of the road.

c. Respondent drove for a distance of 30 feet with the two left wheels in said ditch without slackening speed.

d. Respondent drove up out of the said ditch across to the other side of the road and down an embankment without slackening speed.

e. Respondent negotiated a sharp curve on a narrow road at the rate of 50 miles an hour.

f. Respondent drove on the wrong side of the road into a ditch across the road and down an embankment, a distance of over 225 feet at the rate of 50 miles an hour without slackening speed.

The lower Court stated:

> "No evidence was adduced to explain what caused the car to leave the highway. The defendant, Ruth Kelley, who was driving the car was not called as a witness."

The lower Court in effect has stated that the twelve jurors, that the Trial Court and the four Judges of the Appellate Division of the Supreme Court of the State of New York did not act as average reasonable men when they found that driving around a sharp curve on a narrow road at the rate of 50 miles an hour into a ditch on the wrong side of the road and then across to the other side of the road and down an embankment without any effort to slacken speed for a distance of over 225 feet, were not sufficient facts to warrant the conclusion that Ruth Kelley did not add to the usual perils of the road.

None of the Virginia courts are in accord with the decision of the lower Court. Are the decisions relied on by the lower Court an exception to the generally accepted view of the Virginia courts as laid down in the *Poole* case, *supra.*

The Virginia courts have held that driving on the wrong side of the road may be considered as evidence of

gross negligence as may be the fact that the vehicle was being driven around a sharp turn at a fast rate of speed.

See:

Collins v. *Robinson*, 160 Va. 520;
Margiotta v. *Aycock*, 162 Va. 557;
Stubbs v. *Parker*, 169 Va. 676;
Hackley v. *Robey*, 170 Va. 55;
Watson v. *Coles*, 170 Va. 141;
Thornhill v. *Thornhill*, 172 Va. 553;
Yorke v. *Cottle*, 173 Va. 372;
Worcester v. *McClurkin*, 174 Va. 221.

All of the foregoing cases were cited with approval in the case of *Carroll* v. *Miller*, 175 Va. 388, which decision was called by the lower Court as being "an authoritative and complete review of these decisions * * *."

POINT III.

The decisions relied on by the lower Court do not rule this case.

The lower Court relies upon four decisions, none of which rule this case.

In the case of *Massaletti* v. *Fitzroy*, 228 Mass. 487, there was *no claim made* of gross negligence and *no evidence offered* of gross negligence. The decision by the court was that the claim of gross negligence should have been made and some proof offered to sustain it in order for the plaintiff to recover.

In the case of *Young* v. *Dyer*, 161 Va. 434, the trial court set aside the verdict as there was no evidence of any negligence whatsoever, merely proof of driving an automobile at 50 miles an hour over an unfamiliar road. There was no proof of a narrow road, of a sharp turn, of driving on the wrong side of the road, of driving in a ditch, of failing to slacken speed after the vehicle had

left the road, in fact no facts comparable to the facts in the case at bar.

It might be in place to point out that the Virginia courts give a great deal of weight to the determination of the trial court as to whether or not there was sufficient facts offered in evidence to sustain the verdict.

In the *Young* case, *supra,* the trial court found that there were not, in the case at bar, the trial court found that there were.

In the case of *Boggs* v. *Plybon,* 157 Va. 30 and in the case of *Carroll* v. *Miller,* 175 Va. 388, there was no such evidence as was offered in the case at bar. The evidence in each case was that the automobile was not driven at an excess rate of speed but in each case at but 35 miles an hour. In both cases it was shown that it was no narrow road, no sharp curve and no crossing to the wrong side of the road.

It is respectfully submitted that a reading of the case of *Carroll* v. *Miller, supra,* called an "authoritative" case by the lower Court will show that a set of facts such as presented at the trial of the case at bar are amply sufficient to sustain the jury's verdict and *does not stand for the principle* which the Court of Appeals of the State of New York says it stands for in its opinion in the case at bar.

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.